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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 275

ERNEST WERNER LOOS, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 15a-21a) is reported at 407 F. 2d 651.

JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 1969. A petition for rehearing was denied on March 24, 1969. The petition for a writ of certiorari was filed on June 23, 1969, a Mon-

day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the determination of the Board of Immigration Appeals that petitioner was inadmissible into this country in 1959 as an alien ineligible to citizenship was supported by clear, convincing and unequivocal evidence.

2. Whether the Board properly declined to terminate the deportation proceedings so as to permit petitioner to apply for naturalization.

3. Whether the Board correctly concluded that, when petitioner entered the United States in 1959, he was not "otherwise admissible" and was thus ineligible for relief from deportation for misrepresentation of his eligibility for citizenship under Section 241(f) of the Immigration and Nationality Act (8 U.S.C. 1251(f)).

STATUTES INVOLVED

The Immigration and Nationality Act of 1952, 66 Stat. 163 *et seq.*, as amended, provides, in pertinent part:

Section 101 (8 U.S.C. 1101):

(a) As used in this Act—

* * * *

(19) The term "ineligible to citizenship," when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from

becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76), or under any section of this Act, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.

Section 212 (8 U.S.C. 1182):

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * *

(22) Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants; or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency, except aliens who were at the time of such departure nonimmigrant aliens and who seek to reenter the United States as nonimmigrants;

* * * *

Section 241 (8 U.S.C. 1251):

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * *

(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

Section 315 (8 U.S.C. 1426):

(a) Notwithstanding the provisions of section 405(b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien.

Section 3(a) of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 55 Stat. 845, provides, in pertinent part:

Sec. 3(a) * * * *Provided*, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be

relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any such person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *."

STATEMENT

1. Petitioner Ernest Werner Loos, a native and national of Argentina, was originally admitted to the United States for permanent residence on August 3, 1940 (R. 200-201).[1] He departed the country to live in Switzerland on July 30, 1947 (R. 200-201). He reentered the country on September 15, 1959, as a non-quota immigrant for permanent residence and, except for a vacation abroad in 1963, has remained in the United States since 1959 (R. 127, 139, 203, 224-230).

In 1965 he was charged with being deportable under Section 241(a)(1) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(1)), on the ground that, at the time of his entry in 1959, he was excludable under Section 212(a)(22) of that Act (8 U.S.C. 1182(a)(22)), as being ineligible for citizenship because of his previous application for relief from military service on the ground of alienage made during World War II (R. 98, 139-141). Following a hearing, the special inquiry officer ordered the proceedings terminated for the purpose of permitting petitioner to proceed toward naturalization (R. 92-

[1] "R." refers to the certified copy of the administrative record which is on file with the Clerk of this Court.

95). On appeal by the Immigration and Naturalization Service, the Board of Immigration Appeals reversed the special inquiry officer's decision and remanded the case for further proceedings (R. 214-216).

After a reopened hearing the special inquiry officer found that petitioner had applied for and received an exemption from military service from May 22, 1944, until September 21, 1945, on the ground of alienage, and thus was permanently debarred from citizenship under Section 315 of the Act (8 U.S.C. 1426). Accordingly, he found that petitioner was deportable, and that it would be useless to terminate the deportation proceedings to permit him to apply for naturalization. The special inquiry officer granted voluntary departure and, in the event of failure to depart, directed deportation to Argentina (Pet. App. 1a-9a; R. 65-75). He then certified the case to the Board, which, on October 28, 1966, affirmed his order (R. 48-59).

A petition for review in the court of appeals was, on the government's motion, remanded for further proceedings in the light of this Court's decision in *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276 (R. 36-38). Following that remand, on September 27, 1967, the Board of Immigration Appeals found that the record contained clear, convincing and unequivocal evidence that, at a time when petitioner was eligible for military service and was in a non-deferred, non-exempt status, he applied for and was granted exemption from military service

as a neutral alien. It ruled that he was deportable as an alien ineligible for citizenship at the time of his 1959 entry to the United States (R. 306). The Board granted voluntary departure and, alternatively ordered deportation, thus supplanting the earlier similar order of the special inquiry officer (Pet. App. 11a-14a). On appeal the court of appeals affirmed the Board's decision by dismissing a petition for review filed under Section 106(a) of the Act (8 U.S.C. 1105a (a)).

2. The evidence in the administrative proceedings, which includes petitioner's Selective Service file, showed that he registered for the draft in Summit, New Jersey, shortly after his arrival in the United States in 1940 (R. 153, 201). On March 14, 1941, he was classified IV-C (resident alien who had not declared his intent to become a citizen) under Section 3(a) of the Selective Training and Service Act of 1940, which provided for military service of "every male alien residing in the United States who has declared his intention to become * * * a citizen" (54 Stat. 885; 32 C.F.R. 603.359 (1940 Supp.)). On December 20, 1941, Congress amended the Act to provide for military service for all male alien residents of the United States except, *inter alia*, citizens of neutral countries who made application to be relieved of liability for military service prior to their induction into the Armed Forces (55 Stat. 845). As a citizen of a neutral country (Argentina), petitioner became liable for military service under this amendment unless application for relief was applied for and granted (R. 140-151). Thereafter, petitioner

went through a series of reclassifications terminating in a classification of I-A pending receipt of a Form DSS-304—an Alien Personal History and Statement (R. 58).[2]

On August 5, 1943, petitioner sent a letter to his New Jersey draft board returning the Form DSS-304 fully executed and requesting a Form DSS-301, the application for relief from military service on the ground of alienage (R. 58). On August 23, 1943, petitioner executed the Form 301 before an official of a local board in California where he was then residing (R. 145). That form contained the following warning: "I understand that the making of this application to be relieved from such liability [service in the land or naval forces of the United States under the Selective Training and Service Act of 1940] will debar me from becoming a citizen of the United States." Petitioner filled in all of the required information above and below the warning on ineligibility for citizenship, including the words "have not" to complete the sentence: "I have not filed a declaration of intention to become a citizen of the United States."[3]

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[2] During this period, petitioner received at least the following classifications: III-A (dependency deferment) on April 3, 1942; III-B (occupational deferment) on March 20, 1943; II-A (type not indicated in file) on June 8, 1943 (R. 57). His certified Selective Service record does not contain a notation of classification of IV-F (physically unfit) ever being given to petitioner.

[3] On January 10, 1965, an investigator for the Immigration and Naturalization Service took a sworn statement from petitioner and asked him whether he had read the application for relief from military service at the time he signed it. He answer, "Well, the way you do it, you don't read every little

The draft board received the Form 301 on August 28, 1943 (R. 58, 145). On May 17, 1944, the board received an application from petitioner for an occupational deferment (R. 58). The following day, a notation was entered in his Selective Service file indicating his eligibility for a IV-C classification (R. 58). On May 22, 1944, he was reclassified IV-C (R. 58).

On March 27, 1945, Argentina became a co-belligerent by a declaration of war on the Axis powers (R. 53, 58). Petitioner was sent a Form DSS-42A to obtain information for reclassification (R. 59). On April 27, 1945, the day the completed from was received by the local board, petitioner was continued in his IV-C classification (R. 6, 59). He became 36 years of age in August 1945 and was reclassified IV-A (overage) on September 21, 1945 (R. 6). No subsequent classifications are reflected in the Selective Service file.

Petitioner testified that, when it seemed that he might be drafted sometime in 1943, he got in touch with one Dr. Wolf, a member of a Selective Service medical board in California, to inquire whether there was a chance he would be drafted with his bad back.

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paragraph, but I thought I understood what I was doing. I did not see any implication that I would not be allowed to enter." The investigator then asked, "You understood the form then, is that correct?" Petitioner responded, "Yes" (R. 207). During the reopened deportation hearing on May 23, 1966, the special inquiry officer asked petitioner whether he knew that by signing the Form 301 he would be ineligible to citizenship. Petitioner answered that he realized that, but he saw no connection between that and excludability (R. 135).

Dr. Wolf told him that he could not guarantee exemption from military service (R. 107, 201-202). Petitioner decided that he would be taking a risk if he was drafted and "finally decided it would be safer * * * to ask for relief from military service" (R. 202; see also R. 109-110, 134, 231-232).[4]

ARGUMENT

1. The evidence amply supports the deportation order under the "clear, unequivocal and convincing" standard enunciated by this Court in *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276. Thus, further review is not warranted.

The statutory basis for petitioner's deportation is not in dispute. Aliens in the United States are subject to deportation if they were excludable by the law existing at the time of their entry into the United States, under Section 241(a)(1) of the Act (8 U.S.C. 1251(a)(1)). An alien seeking to come to this country as an immigrant cannot obtain an immigrant visa and must be excluded from admission if he is ineligible to citizenship at the time of entry, pursuant to Section 212(a)(22) of the Act (8 U.S.C. 1182(a)

[4] In April 1965, the New Jersey State Headquarters of the Selective Service System had written to the Immigration and Naturalization Service listing petitioner's classifications as III-A—Dependency; IV-A—Overage; IV-C—Alien requesting relief from liability, not acceptable to the Armed Forces; and IV-F—physically, mentally or morally unfit. The letter went on to say that that office's records had been destroyed, and that therefore the chronology of the classifications and other information could not be furnished and the reason for the IV-F classification could not be determined (R. 208, 105).

(22). Under Section 315(a) of the Act (8 U.S.C. 1426(a)), any alien who applies for exemption from service in the Armed Forces of the United States on the ground that he is an alien and is relieved from service on such ground is permanently ineligible to become a citizen of the United States.[5]

The record is clear that when it became apparent to petitioner that he might be drafted, in spite of his physical condition, he made an informed decision in August 1943 to apply for relief from military service on the ground that he was an alien citizen of a neutral country.[6] He admitted in the course of the

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[5] Section 315 of the Immigration Act became effective on December 24, 1952. Section 3(a) of the Selective Training and Service Act of 1940 had barred from citizenship any alien who *applied* for the alien exemption, regardless of whether he was actually relieved of service on that ground. See *Ceballos* v. *Shaughnessy*, 352 U.S. 599, 605-606. Since the instant order to show cause, as amended, alleged and the proof showed both application for and relief from service on the ground of alienage, there is no occasion to consider the difficult question whether mere application for exemption prior to December 1952 makes an alien ineligible to citizenship in proceedings commenced after December 24, 1952—the distinction relied on by the special inquiry officer here in initially declining to order deportation, before respondent amended its allegations in this regard (see Pet. App. 3a-4a). See *United States* v. *Hoellger*, 273 F. 2d 760, 763, n. 3 (C.A. 2); Section 101(a)(19) of the Immigration Act (8 U.S.C. 1101(a)(19)). Petitioner was ineligible for citizenship under either provision, and the pleadings were appropriately amended to obviate this potential difficulty (see Pet. App. 4a). *Application of Mirzoeff*, 253 F. 2d 671 (C.A. 2), upon which petitioner relies, was a naturalization case and inapposite here. Mirzoeff never was classified IV-C and never was relieved from military service on the ground of alienage.

[6] Although petitioner indicates (Pet. 6, 9) that he applied for exemption on the basis of the treaty in effect between

administrative proceedings that he knew that merely making the application would permanently bar him from citizenship. His certified Selective Service file shows without contradiction that on May 22, 1944, he was given an alien exemption based on his application by being classified IV-C. When Argentina became a co-belligerent in March 1945, petitioner was forwarded appropriate forms to obtain information to reassess his classification. He was eventually classified IV-A (overage) following his thirty-sixth birthday in August 1945 and never served in the Armed Forces of the United States.[7]

Although there was some unexplained delay in the board's action in classifying petitioner IV-C, mere delay in processing the application for an exemption would not affect the validity of the IV-C classification. Cf. *United States ex rel. Circella* v. *Sahli*, 216 F. 2d 33, 39-40 (C.A. 7), certiorari denied, 348 U.S. 964. Nor did petitioner's application for an occupational deferment, filed on May 17, 1944, which probably called the local board's attention to the still-pending alien exemption application, operate to rescind the application for exemption from service. *Giz* v. *Brownell*, 240 F. 2d 25, 27, 30 (C.A.D.C.), certiorari denied, 353 U.S. 942; *Brownell* v. *Rasmussen*, 235 F. 2d 527, 530 (C.A.

Argentina and this country, the record shows that he did so solely on the basis of Argentina's status as a neutral country.

[7] As petitioner points out (Pet. 16-17; see also Pet. App. 13a-14a), the reasons for some of the local board's actions during the second half of 1945 are not discernible from the Selective Service file and some confusion arises. These later events, however, have no effect upon the alien exemption which he had during 1944 and early 1945.

D.C.), certiorari dismissed, 355 U.S. 859; *Machado* v. *McGrath*, 193 F. 2d 706, 709-710 (C.A.D.C.), certiorari denied, 342 U.S. 948; *Application of Mannerfrid*, 101 F. Supp. 446 (S.D.N.Y.), affirmed, 200 F. 2d 730 (C.A. 2). Moreover, having obtained relief from service on the ground of alienage, petitioner's eligibility for citizenship, at least in the absence of subsequent actual service in the Armed Forces,[8] could not be reinstated because he might have been subject to service when Argentina became a cobelligerent, as he suggests. *Kahook* v. *Johnson*, 273 F. 2d 413 (C.A. 5); *Petition of Skender*, 248 F. 2d 92 (C.A. 2), certiorari denied, 355 U.S. 931. Similarly, his subsequent classification of IV-A (overage) did not prevent his prior IV-C exemption from "effectively relieving" him from military service for the time it was effective. *Gilligan* v. *Barton*, 265 F. 2d 904 (C.A. 8).

Petitioner's argument that the record does not support the conclusion that he was in fact exempted from service as an alien is based essentially on the 1965 letter from the New Jersey State Headquarters of the Selective Service System that he had at some unknown time been given, among other classifications,

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[8] Although early cases held that the disqualification attached upon the making of the application and could not be removed by subsequent service in the Armed Forces, later cases have taken the position that when the alien is inducted and actually serves in the Armed Forces, the previous bar to naturalization based on exemption from military service for alienage is removed. See *United States* v. *Hoellger*, 273 F. 2d 760 (C.A. 2); *Cannon* v. *United States*, 288 F. 2d 269 (C.A. 2); *In re Rego's Petition*, 289 F. 2d 174 (C.A. 3); *United States* v. *Lacher*, 299 F. 2d 919 (C.A. 9).

a IV-F exemption. As noted by the court of appeals, the Board of Immigration Appeals was warranted in giving credence to the intact, official Selective Service file certified by the Director of the Selective Service System over a letter from State Headquarters that they had destroyed their records and had no chronology of classifications or basis for a IV-F classification that could be furnished. Certainly, when coupled with petitioner's vague and incomplete memory of events surrounding a physical examination and an alleged IV-F classification of which he has no record, the Board's reliance on the official file was reasonable, if not compelled, particularly in view of Section 315 (b) of the Act (8 U.S.C. 1426(b)).

Petitioner's further contention that he was misled by a certain doctor into following the safe route of applying for an alienage exemption rather than seek a IV-F classification (Pet. 11-15) is frivolous on his own statement of the facts. When it appeared that he might be drafted, petitioner apparently sought the advice of a Dr. Wolf, a physician who was a member of a Selective Service medical board in California, but was not connected with petitioner's own draft board. Petitioner's statements show that Dr. Wolf merely declined to give him any assurance that his physical condition would exempt him from the draft at some future date. Petitioner's physical condition, which he dated back to a teenage accident some thirteen years prior to coming to this country, must not have been completely disabling for military service since he stated in his Selective Service registration questionnaire in 1940, before the war started, that

to the best of his knowledge he had no physical or mental defects or diseases (R. 52, 157).

Circumstances which existed in *Moser* v. *United States*, 341 U.S. 41, and other cases cited by petitioner (Pet. 12-15), which have induced the courts to relieve an applicant for exemption from military service on the grounds of alienage from the bar against subsequently acquiring citizenship, essentially on the theory that the alien did not make an intelligent choice due to misinformation from an official source, are absent here. *E.g.*, *In re Bouchage's Petition*, 177 F. Supp. 887 (S.D.N.Y.); *Petition of Sally*, 151 F. Supp. 888 (S.D.N.Y.). Petitioner made a reasoned and deliberate decision to apply as a neutral alien for exemption from military service with the knowledge that it would permanently bar him from citizenship. He obtained an exemption on that basis, and was thereby "effectively relieved" from service. Having done so, petitioner must live with the legal consequences of his decision. *Lapenieks* v. *Immigration and Naturalization Service*, 389 F. 2d 343 (C.A. 9), certiorari denied, 391 U.S. 951; see also *Aklin* v. *United States*, 340 F. 2d 746, 748 (C.A. 2); *Prieto* v. *United States*, 289 F. 2d 12, 14 (C.A. 5).

2. Petitioner contends that the Board abused its discretion in refusing to terminate the reopened proceeding pending adjudication of an application for naturalization on its view that the evidence establishing petitioner's ineligibility for citizenship showed that delay for that purpose would be a meaningless

gesture (Pet. 18-19).[9] Although the Attorney General may terminate deportation proceedings to permit an alien to apply for naturalization, there is no occasion to do so unless the petitioner can show that there is some significant chance of success in obtaining naturalization. *Matter of Hroncich*, 11 I. & N. Dec. 193. Petitioner has clearly failed to make such a showing here. Indeed, he has failed to sustain his position on eligibility to citizenship in the context of deportation proceedings, where an unusually heavy burden of proof rests upon the government. In a naturalization proceeding "the burden is on the alien applicant to show his eligibility for citizenship in every respect," and doubts are to be "resolved in favor of the United States and against the claimant." *Berenyi* v. *District Director*, 385 U.S. 630, 636-637. Petitioner's claim of abuse of discretion in not deferring to a naturalization court is thus without substance.

3. At the consulate in 1959, petitioner erroneously answered negatively on his visa application a question which called for the applicant to state whether he was a member of listed excludable classes, including aliens ineligible to citizenship. At the deportation hearing, petitioner testified that he was not aware that he was excludable on that ground and never had connected ineligibility for citizenship with

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[9] Termination of the deportation proceeding would be required since Section 318 of the Immigration and Nationality Act (8 U.S.C. 1429), provides that no person against whom there is a final finding of deportability shall be naturalized and no petition of naturalization shall be heard by a naturalization court if a deportation proceeding is pending against the alien seeking naturalization.

inadmissibility to the United States (R. 125-129, 135, 203-204). Petitioner argues that, on this basis, he is entitled to a waiver of deportation under Section 241(f) which eliminates the fact of fraud and misrepresentation in obtaining entry into the United States as a ground of deportation for certain aliens with close family ties in the United States, if they were "otherwise admissible" at the time of their entry. The provision on its face applies only to misrepresentations for which an alien may be excluded or deported. The only such provision is Section 212(a)(19) (8 U.S.C. 1182(a)(19)), which excludes aliens who have procured entry into the United States by fraud or *willful* misrepresentation. There is therefore no occasion to invoke Section 241(f) here. Indeed, if this type of misrepresentation waives the ground of exclusion, an alien innocently fails to disclose, none of the exclusionary provisions would ever provide a basis for deportation under Section 241(a)(1) of the Act (8 U.S.C. 1251(a)(1).[10]

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[10] *In re Yuen Lan Hom*, 289 F. Supp. 204 (S.D.N.Y.), is erroneous in applying Section 241(f) to an innocent misrepresentation. In that case, a woman thought she entered the country as the wife of a United States citizen. In fact her husband was an alien. When this fact was discovered, she had her status adjusted to permanent residence to cure the defect. In subsequent naturalization proceedings, the court applied Section 241(f) to the unintentional misrepresentation in order to back date her entry into permanent residence status to her original entry date, thus making her eligible for naturalization without further delay. Although the Immigration and Naturalization Service has acquiesced in the decision as applied to naturalization proceedings, we think it clear that Section 241(f) was never intended to apply to innocent misrepresentations which simply could not provide a basis for separation of families or deportation.

Even if Section 241(f) were applicable in the instant circumstances, petitioner nevertheless would be qualitatively excludable from this country, not for any fraud, but because he was ineligible to citizenship. Therefore, he is not "otherwise admissible" within the purview of Section 241(f). *de Vargas* v. *Immigration and Naturalization Service*, 409 F. 2d 335 (C.A. 5), pending on petition for a writ of certiorari, No. 479 Misc., this Term; *Espinosa* v. *Immigration and Naturalization Service*, 404 F. 2d 544 (C.A. 9); *Matter of Eng*, 12 I. & N. Dec. 855. As those decisions correctly point out, *Immigration and Naturalization Service* v. *Errico*, 385 U.S. 214, on which petitioner seeks to rely, did not delete the "otherwise admissible" restrictions from Section 241(f).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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